

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANET D. CONNER,
Plaintiff,

v.

CAROLYN W. COLVIN,
Defendant.

Case No. 13-cv-03324-KAW

**ORDER GRANTING MOTION TO
ALTER JUDGMENT**

Re: Dkt. No. 35

On September 10, 2014, the Court granted Plaintiff Janet D. Conner's motion for summary judgment, denied Defendant Carolyn W. Colvin's cross-motion for summary judgment, and remanded the case for further proceedings. Judgment was entered consistent with that order. Plaintiff moved to alter that judgment pursuant to Federal Rule of Civil Procedure 59(e), seeking a remand for immediate payment of disability insurance benefits. On December 12, 2014, the Court granted the motion.

It is now the Commissioner who moves to alter judgment pursuant to Rule 59(e).¹ Plaintiff opposes the motion. For the reasons set forth below, the motion is GRANTED.

I. BACKGROUND

A. Plaintiff's applications

Plaintiff filed a Title II application for Social Security Disability Insurance Benefits ("DIB") on January 22, 2010 and a Title XVI application for Supplemental Security Income

¹ The parties are advised that Civil Local Rule 7-9 governs motions for reconsideration and requires that parties obtain leave of court prior to filing such motions. The parties shall ensure that they comply with this requirement in the future.

1 ("SSI") on January 27, 2010. (Administrative Record ("AR") at 78-79, 136-37, 139-43.) She
 2 alleged that she became disabled on June 30, 2007, due to right knee pain, hand pain, back pain,
 3 and high blood pressure. (*Id.* at 82, 91, 136, 140.) The Social Security Administration ("SSA")
 4 denied Plaintiff's applications initially and on reconsideration. (*Id.* at 82-86, 91-95.)

5 **B. The administrative hearing**

6 Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (*Id.* at 96.)
 7 ALJ Mary P. Parnow held the hearing on August 29, 2011. (AR at 96-97). Plaintiff, who was
 8 represented by counsel, testified at the hearing, as did Malcolm J. Brodzinsky, a vocational expert
 9 ("VE").

10 1. Plaintiff's testimony

11 Plaintiff testified that she was 53 years old at the time of the hearing, possessed a high
 12 school diploma, and had last worked in July 2008, doing part-time office work at a warehouse.
 13 (*Id.* at 52.) She stated that she stopped doing that work because sitting bothered her, she was
 14 taking breaks and "they didn't like that." (*Id.* at 53.) She indicated that every 30 minutes, she
 15 would elevate her leg for about 10 minutes and that she could not work while doing so because of
 16 the pain. (*Id.*) At home, she elevates her leg on two pillows for at least five or six hours because
 17 she's in bed most of the time. (*Id.* at 64.) She does this because of the pain and to take some
 18 pressure off her knee. (*Id.* at 65.)

19 Prior to her office work, Plaintiff was employed as a catering cook and pastry chef for
 20 about three years. (*Id.* at 53-54). In that position, she would cook, cater, and serve food at
 21 different events. (*Id.* at 54.) She would also lift chaffing dishes weighing approximately 20 to 25
 22 pounds. (*Id.* at 54-55.) Before her work as a cook and pastry chef, Plaintiff worked as a floor
 23 supervisor at a telephone call center, supervising 60 operators, walking the floor, taking over
 24 phone calls, and troubleshooting. (*Id.* at 55.) She held that job for three years. (*Id.* at 56.) She
 25 testified that she would not be able to return to that type of work because of "the sitting for periods
 26 of time and the walking and [her] hands are messed up and [her] back." (*Id.*) She also indicated
 27 that she worked as a dishwasher and a cook at a soul food restaurant, and did some work at a
 28 bakery at one point. (*Id.* at 58.)

1 Plaintiff further testified that she had been receiving worker's compensation as a result of a
2 knee injury she sustained while lifting a chaffing dish during a catering event. (*Id.* at 60.) She
3 indicated that the claim had been settled, and a portion of the settlement was intended to cover a
4 knee replacement. (*Id.*) According to Plaintiff, she experiences a "dull throbbing pain all the
5 time," her knee is stiff in the morning, and it's worse during cold weather. (*Id.*) She stated that it
6 takes her "a minute to get around, to unwind a little bit," and sometimes she has to ice her knee
7 before she bathes. (*Id.*)

8 Plaintiff indicated that she had two surgeries and went to therapy twice. (*Id.* at 61.) After
9 the first surgery,² she felt "a little relief at first, [and she] even tried to go back to work" but then
10 she went back to the doctor and needed another surgery. (*Id.*) She stated that she experienced no
11 relief after the second surgery. (*Id.*) Her pain is about a seven or eight in the morning when she
12 first wakes up, and she can get the pain down to a five or six after she ices her knee and takes her
13 pain pills. (*Id.* at 61-62.) At the time of her second surgery,³ her doctor advised her that she
14 needed a knee replacement. (*Id.* at 61.)

15 With respect to other impairments, Plaintiff testified that she's been diagnosed with sciatic
16 nerve, arthritis, and depression. (*Id.* at 62.) She also testified that she can sit and stand for about
17 15-20 minutes, walk for about a half block before stopping to take a break, and lift "maybe five
18 pounds." (*Id.* at 62, 63.) She stated that she cannot lift her one-year old grandchild. (*Id.* at 64.)
19 She also indicated that she has problems with concentration and focus as a result of her pain
20 medication. (*Id.* at 65.) On one occasion, she forgot she was boiling eggs and woke up to the
21 sound of her smoke detector, and on another, she left some water running. (*Id.*) Plaintiff also
22 stated that some of her medications give her bad headaches, sweats, and trouble sleeping. (*Id.* at
23 65, 66.) She takes hydrocodone once every eight hours or once every four hours if the pain is bad.
24 (*Id.* at 66.)

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27 ² Plaintiff underwent her first surgery to repair a right knee medial meniscus tear on February 6,
2008. AR at 284.

28 ³ Plaintiff's second surgery occurred on June 8, 2009. *Id.* at 289.

1 Plaintiff also testified that she lives alone in an apartment and that her daughter, who was
2 28 at the time of the hearing, visits about four times a week. (*Id.* at 67, 68.) She helps with the
3 cleaning, does the grocery shopping, and prepares her mother's meals for the week, which Plaintiff
4 reheats in the microwave. (*Id.* at 67, 68.) As for common day-to-day activities, Plaintiff stated
5 that she can wash her hair on her own, which she keeps short because it's easier to manage, she
6 does not drive because it causes her too much pain, and she does not go out or socialize too much
7 but goes to church when she can, where she sits in the back so that she does not interrupt everyone
8 when she has to get up and go outside. (*Id.* at 69, 70.)

9 2. The VE's testimony

10 The VE testified that Plaintiff's past work as a catering cook was semi-skilled work with a
11 light physical demand. (*Id.* at 72.) He classified her work as a customer service clerk as skilled
12 work with sedentary physical demands. (*Id.*) Plaintiff's work as a dishwasher was unskilled
13 medium work, while her work as a cook was skilled work with medium physical demands. (*Id.* at
14 73.) Her work as a floor supervisor at a call center qualified as skilled work with sedentary
15 physical demands. (*Id.*)

16 The VE considered various hypotheticals posed by the ALJ and by Plaintiff's counsel.
17 (*Id.*) The ALJ asked the VE to first consider an individual who was 48 at onset, 53 at the time of
18 the hearing, with a high school education, and with the past relevant work he had described. (*Id.*)
19 This individual could (1) stand and walk for four hours in an eight hour day, with breaks, (2) sit
20 for six hours in an eight hour day, also with breaks, (2) carry 10 pounds frequently and 20 pounds
21 occasionally, (3) push and pull devices up to 20 pounds, (4) occasionally bend, squat, kneel,
22 crouch, climb, and crawl, and (5) would need a cane for ambulation over three to four blocks.
23 (*Id.*) When asked whether such an individual could perform Plaintiff's past relevant work, the VE
24 stated that the individual could be a customer service clerk and a floor supervisor in a call center.
25 (*Id.* at 74.)

26 The ALJ then asked the VE to consider an individual with the same age, education, and
27 work experience, but with different limitations. (*Id.*) This individual could not crawl, kneel,
28 climb, push or pull "in regards to the right knee" and would be restricted to light work as defined

1 in the worker's compensation context (i.e., work that involves standing or walking with minimal
2 demands for physical effort). (*Id.*) In considering this second hypothetical, the VE gave the same
3 response. (*Id.*)

4 Plaintiff's attorney asked the VE to revisit the first hypothetical, with the additional
5 limitation that the individual would require a cane for all standing and walking. (*Id.* at 75.) When
6 asked whether that would alter his previous response, the VE stated that it would remain
7 unchanged. (*Id.*)

8 Plaintiff's counsel also asked the VE to reconsider the second hypothetical as if it
9 concerned an individual who needed to sit and stand at will. (*Id.*) In response to that modified
10 hypothetical, the VE testified that the additional limitation would preclude both positions absent
11 an accommodation. (*Id.*)

12 The VE, also in response to additional hypotheticals posed by Plaintiff's attorney, testified
13 that an individual who needed to elevate one leg between six to 12 inches 10 to 20 percent of the
14 workday would be precluded from performing that work. (*Id.*) When considering an individual
15 who would need to take a 15-minute unscheduled break once every hour, the VE testified that
16 such a limitation would preclude all work. (*Id.* at 76.) He further testified that if someone who
17 was performing the work mentioned in either of the ALJ's two hypotheticals was going to be
18 absent four days per month, that would "preclude that work and all other work." (*Id.* at 76.)

19 **C. The ALJ's decision**

20 On September 23, 2011, the ALJ issued an unfavorable decision. (*Id.* at 15-22). In
21 reaching her decision, the ALJ followed the five-step sequential process that governs Social
22 Security disability determinations. *See* 20 C.F.R. §§ 404.1520(a); 416.920(a). At step one, the
23 ALJ found that Plaintiff has not engaged in substantial gainful activity since June 30, 2007, the
24 alleged onset date. (*Id.* at 17.) At step two, the ALJ determined that Plaintiff suffers from two
25 severe impairments: right knee injury status post two partial right knee meniscectomies and
26 obesity. (*Id.*) She based that determination on "[t]he evidence of record, including the testimony
27 of the claimant[,]" which supported a finding that these "medical impairments significantly limit
28 her ability to perform basic work activities." (*Id.*) At step three, the ALJ determined that Plaintiff

1 does not have an impairment or combination of impairments that meets or medically equals one of
2 the listed impairments in 20 C.F.R. Pt. 404, Subpt. P, App'x 1. (*Id.* at 18.) She found that the
3 medical evidence did not support a finding to the contrary. (*Id.*)

4 Before proceeding to step four, the ALJ determined that Plaintiff has the residual
5 functional capacity to carry 20 pounds occasionally and 10 pounds frequently, stand and walk for
6 four hours in an eight-hour workday, sit for six hours in an eight-hour workday, and push and pull
7 devices up to 20 pounds. (*Id.* at 18-21.) She also determined that Plaintiff can occasionally bend,
8 squat, kneel, crouch, climb, and crawl, though "a cane is required for ambulation over 3 to 4
9 blocks." (*Id.*) The ALJ also found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause the alleged symptoms, but that her statements concerning the
11 intensity, persistence, and limiting effects of her symptoms were "not credible to the extent they
12 [we]re inconsistent with the above residual functional capacity assessment." (*Id.* at 20.) To
13 support this finding, the ALJ stated:

14 The objective evidence does not support the claimant's allegations. Claimant was
15 released to work, and it appears only did not work because there was no work
16 available. Further, despite the claimant's complaints of hand problems, there were
17 no sensory or motor deficits noted in hands at consultative examination. In
18 addition, in regard to the claimant's cane, Dr. Krinsky advised claimant to use the
19 cane as needed, not all the time, and notes from Dr. Krinsky indicated that she only
20 occasionally used a cane. Claimant testified to very limited activities of daily
21 living, stating that her daughter helps with cooking, cleaning and shopping, which
22 seems at odds with her report to the consultative examiner that she can do light
23 chores around the house but not vacuuming, cleaning tubs or kneeling and bending.
24 Despite her complaints of back pain, objective evidence only revealed mild
25 degenerative disc disease of the lumbar spine. Finally, contrary to claimant's
26 testimony, all of the treatment notes document that claimant's knee problem
27 improved following her second surgery.

28 (*Id.* at 20-21.)

29 In determining Plaintiff's residual functional capacity, the ALJ placed great weight on the
30 opinion of Dr. Rana "based on h[er] examining relationship and because his conclusions are the
31 most consistent with the objective findings in the medical records." (*Id.* at 20.) Dr. Rana, a
32 consultative examiner, completed an internal medicine evaluation on April 9, 2010. (*Id.* at 362.)
33 In her report, she noted that none of Plaintiff's previous medical records were available for review

1 and that Plaintiff was providing her medical history herself. (*Id.*) Dr. Rana indicated that
2 Plaintiff's chief complaints were pain in the knees, carpal tunnel syndrome, lower back pain, high
3 blood pressure, hypercholesterolemia, and heartburn. (*Id.*) The physical examination Dr. Rana
4 conducted revealed mild lower back tenderness and mild tenderness in both knees. (*Id.* at 363,
5 364.) Dr. Rana diagnosed Plaintiff with chronic pain in her knees, probable mild carpal tunnel
6 syndrome in both hands, lower back pain most probably secondary to mild degenerative
7 disc/degenerative joint disease, a history of hypertension, hypercholesterolemia, and probable
8 gastroesophageal reflux disease. (*Id.* at 364.) She opined that Plaintiff can (1) stand and walk for
9 four hours in an eight-hour day with breaks, (2) sit for six hours in an eight-hour day with breaks,
10 (3) carry 10 pounds frequently and 20 pounds occasionally, (4) push and pull devices up to 20
11 pounds, (5) occasionally bend, squat, kneel, crouch, climb, and crawl, and (5) ambulate over three
12 to four blocks with use of a cane. (*Id.*)

13 The ALJ gave some weight to the Dr. Charles' assessment, "to the extent consistent with
14 Dr. Rana's." (*Id.* at 20.) Dr. Charles examined Plaintiff on two occasions, first on October 30,
15 2008 and a second time on January 13, 2010. (*Id.* at 488-497, 506-509.) In his first report, Dr.
16 Charles opined that Plaintiff had suffered a probable medial meniscus tear. (*Id.*) He ordered an
17 MRI, the results of which were "consistent with a recurrent flap tear of the medial meniscus and
18 free edge lateral meniscal tear." (*Id.* at 498.) In his second report, Dr. Charles noted that Plaintiff
19 underwent a second surgery on June 8, 2009, at which time Dr. Krinsky, who performed the
20 surgery, noted a new tear in the anterior horn of the medial meniscus. (*Id.* at 492.) Dr. Charles
21 also noted that there was marked swelling in Plaintiff's right knee. (*Id.* at 489, 491.) He
22 considered Plaintiff to be a candidate for a total knee replacement in the future. (*Id.* at 496.)

23 The ALJ placed little weight on the opinions of Dr. Young, one of Plaintiff's treating
24 physicians, and Dr. Krinsky, who performed Plaintiff's knee surgeries. (*Id.* at 20.) Dr. Krinsky
25 completed a medical source statement on August 12, 2011. (*Id.* at 571-75.) According to Dr.
26 Krinsky, Plaintiff's first visit to his office occurred on February 12, 2008 and continued on a
27 monthly basis. (*Id.*) Dr. Krinsky opined that Plaintiff can sit for less than two hours in an eight-
28 hour workday and stand/walk for less than two hours in an eight-hour workday. (*Id.* at 574.) He

1 also opined that plaintiff would have to walk every 15 minutes for five minutes at a time, would
2 need a job that allowed her to shift positions at will because of pain, muscle weakness, and chronic
3 fatigue, would need to take 15-minute unscheduled breaks every 30 minutes, and would have to
4 elevate her leg to chair width. (*Id.*) He also indicated that Plaintiff must use a cane or other
5 assistive device and that she would be absent from work more than four days per month due to her
6 impairments or treatment. (*Id.* at 574, 575.)

7 The ALJ considered Dr. Krinsky's progress notes "completely inconsistent with his
8 assessment of [*sic*] that claimant could sit/stand/walk less than 2 hours." (*Id.* at 20.) She noted
9 that Dr. Krinsky returned Plaintiff to full duty as of November 11, 2009, but indicated that there
10 was no work available. (*Id.*) She also noted that (1) treatment notes from January 2010 indicated
11 that claimant only occasionally uses a cane, (2) notes from March and May 2010 indicated that
12 there was still no work available, (3) notes from September 2010 indicated that claimant was
13 getting better by the week but that no work was available, and (4) opinions from July 2010 and
14 August 2011 were primarily based on claimant's subjective complaints. (*Id.*) The ALJ stated that
15 treatment records clearly showed that Plaintiff improved following the second knee procedure.
16 (*Id.*)

17 The ALJ did not give any reasons for placing little weight on Dr. Young's opinion other
18 than stating that his opinion "appear[ed] to be primarily based on the claimant's subjective
19 complaints." (*See id.*) Dr. Young had completed a physician's medical source statement on July
20 14, 2010, in which he indicated that he had seen Plaintiff on a monthly basis since March 4, 2009.
21 (*Id.* 439-42.) He noted that Plaintiff's prognosis was "guarded," that Plaintiff complained of
22 throbbing pain in her right knee that is worse when standing and sitting for prolonged periods of
23 time. (*Id.*) He stated that Plaintiff is a candidate for total knee replacement in the future. (*Id.*) He
24 opined that Plaintiff would need to take a 15-minute unscheduled break at least every hour, that
25 Plaintiff would need to elevate her leg between 6-12 inches with prolonged sitting for
26 approximately 10-20% of the workday, and that Plaintiff must use a cane or other assistive device.
27 (*Id.*) He also opined that Plaintiff would likely be absent from work for more than four days per
28 month as a result of her impairments or treatment. (*Id.* at 442.)

At step four, the ALJ determined that Plaintiff's medical impairments did not preclude her from performing her past relevant work as a customer service clerk or as a floor supervisor at a call center. (*Id.* at 21.) She relied on the VE's testimony that an individual with Plaintiff's limitations, as the ALJ determined them, could perform that type of work. (*Id.*) The ALJ found that Plaintiff "is able to perform these jobs as actually and generally performed," and concluded that Plaintiff has not been under a disability from June 30, 2007, the alleged onset date, through September 23, 2011, the date of her decision. (*Id.*)

Plaintiff requested that the Appeals Council review the ALJ's unfavorable decision. (*Id.* at 10.) The Appeals Council denied review on May 17, 2013, and the ALJ's decision became the final decision of the Commissioner. (*Id.* at 1-6.)

D. District court proceedings

Plaintiff filed her complaint in this Court on July 17, 2013, seeking judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g). (Compl., Dkt. No. 1.) The parties filed their cross-motions for summary judgment, and the Court entered judgment in favor of Plaintiff on September 10, 2014. The case was remanded to the SSA for further proceedings so that the ALJ could give proper consideration to Dr. Young's opinion and revisit her adverse credibility determination as well as the hypotheticals she posed to the VE. (Sept. 10, 2014 Order at 10-11, Dkt. No. 23.) On October 6, 2014, Plaintiff moved to alter or amend judgment pursuant to Rule 59(e). (Pl.'s Mot., Dkt. No. 26.) The Commissioner filed her opposition to the motion on October 27, 2014, and Plaintiff filed her reply on November 14, 2014. (Def.'s Opp'n, Dkt. No. 29; Pl.'s Reply, Dkt. No. 32.) The Court granted that motion on December 12, 2014 and remanded the case for immediate payment of benefits. (Dec. 12, 2014 Order, Dkt. No. 33.)

On January 9, 2015, the Commissioner filed her own motion to alter or amend judgment pursuant to Rule 59(e). (Def.'s Mot., Dkt. No. 35.) Plaintiff filed her opposition to the motion on January 16, 2015. (Pl.'s Opp'n, Dkt. No. 36.) The Commissioner's reply followed on January 23, 2015.

II. LEGAL STANDARD

"There are four grounds upon which a Rule 59(e) motion may be granted: 1) the motion is

1 necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the
2 moving party presents newly discovered or previously unavailable evidence; 3) the motion is
3 necessary to prevent manifest injustice; or 4) there is an intervening change in controlling law.
4 *Turner v. Burlington N. Santa Fe. R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citations and
5 internal quotations omitted). Rule 59(e) "offers an extraordinary remedy, to be used sparingly in
6 the interests of finality and conservation of judicial resources." *Kona Enter., Inc. v. Estate of*
7 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotations omitted). A district court has
8 considerable discretion when deciding a Rule 59(e) motion. *Turner*, 338 F.3d at 1063.

9 III. DISCUSSION

10 The Commissioner brings the instant motion on the ground that it is necessary to correct a
11 manifest error of law. (Def.'s Mot. at 2.) She argues that this Court should remand the case for
12 further proceedings, as on this record, there is serious doubt as to whether Plaintiff is actually
13 disabled. (*Id.* at 4.) According to the Commissioner, this serious doubt stems from the differing
14 opinions of Dr. Young and Dr. Rana and evidence in the record showing that Plaintiff's condition
15 improved following her second surgery. (*Id.* at 5, 6.) She further argues that the Court erred when
16 it remanded the case for payment of benefits because the ALJ may be able to provide the specific
17 and legitimate reasons for disregarding Dr. Young's opinion, which the Commissioner considers
18 "isolated evidence" that should not support an award of benefits. (*Id.* at 9.) In advancing these
19 arguments, the Commissioner relies on two recent Ninth Circuit opinions, *Treichler v.*
20 *Commissioner of Social Security Administration*, 775 F.3d 1090 (9th Cir. 2014) and *Burrell v.*
21 *Colvin*, 775 F.3d 1133 (9th Cir. 2014).

22 Plaintiff argues that the Commissioner merely rehashes arguments this Court has
23 previously considered and rejected. (Pl.'s Opp'n at 3.) Had Defendant not cited recent Ninth
24 Circuit authorities that squarely address the issues contested in this case, the Court may have
25 agreed. These cases, however, caution courts from too freely applying the credit-as-true rule in
26 cases where, as here, the record contains conflicts that cast doubt on whether a claimant is actually
27 disabled.

28 The Ninth Circuit has articulated "a three-part credit-as-true standard, each part of which

1 must be satisfied in order for a court to remand to an ALJ with instructions to calculate and award
 2 benefits." *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). The standard is met where "(1)
 3 the record has been fully developed and further administrative proceedings would serve no useful
 4 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence,
 5 whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence
 6 were credited as true, the ALJ would be required to find the claimant disabled on remand." *Id.*
 7 (footnote and citations omitted). If, however, "an evaluation of the record as a whole creates
 8 serious doubt that a claimant is, in fact, disabled" a remand for further proceedings is appropriate,
 9 "even though all conditions of the credit-as-true rule are satisfied." *Id.* at 1021.

10 The claimant in *Treichler v. Commissioner of Social Security Administration* complained
 11 of lower back pain, right knee pain, ankle pain, difficulty emptying his bladder, and fecal
 12 incontinence after suffering a work-related injury. 775 F.3d at 1094. Following an unfavorable
 13 decision by the Commissioner, the claimant sought judicial review, and the district court affirmed
 14 in part and reversed and remanded in part. *Id.* at 1093. The claimant appealed, seeking a remand
 15 for payment of benefits based on the ALJ's improper adverse credibility finding. *Id.*

16 The Ninth Circuit determined that the ALJ erred in failing to identify what portions of the
 17 claimant's testimony were not credible and in failing to explain how the ALJ arrived at that
 18 conclusion. *Id.* But, it rejected the argument that claimant's testimony regarding his urinary
 19 incontinence, fecal incontinence, and disabling pain, combined with the vocal expert's testimony
 20 that a person with such issues would not be able to maintain employment, warranted a remand for
 21 payment of benefits. *Id.* at 1103. The Ninth Circuit determined that the record contained
 22 "significant factual conflicts" between the claimant's testimony and the objective medical
 23 evidence. *Id.* at 1104. Specifically, the claimant testified that he would lose control of his bladder
 24 during the day, though treatment notes showed that the urinary incontinence issue occurred at
 25 night. *Id.* He also testified that he experienced fecal incontinence, but the one medical report on
 26 the issue stated that the claimant complained of constipation and denied problems with fecal
 27 incontinence. *Id.* The claimant further testified that he had debilitating pain twice a week, though
 28 he reported to a physician that his pain medication made life tolerable and stated, during the

1 hearing, that the medication alleviates a lot of the pain. *Id.* Based on these conflicts, the Ninth
2 Circuit concluded that a remand for further proceedings, not payment of benefits, was the
3 appropriate remedy. *Id.* at 1107.

4 In *Burrell v. Colvin*, the Ninth Circuit similarly declined to remand for payment of
5 benefits, opting instead to remand for further proceedings. There, the claimant alleged that she
6 was disabled based on debilitating headaches resulting from back and neck conditions. 775 F.3d
7 at 1135. After an unfavorable decision by the Commissioner, the claimant sought judicial review
8 of the decision, and the district court affirmed. *Id.* On appeal, the Ninth Circuit concluded that
9 substantial evidence did not support the ALJ's rejection of the claimant's testimony or his rejection
10 of the medical assessment of the claimant's treating physician. *Id.*

11 It did not, however, require the ALJ to credit either as true. *Id.* at 1142. It remanded the
12 case to the Commissioner for further proceeding on an open record because the record as a whole
13 raised serious doubt as to whether the claimant was actually disabled. *Id.* This serious doubt
14 stemmed from portions of the record that the ALJ had not discussed, i.e., (1) the claimant's
15 testimony that she could no longer knit, which was contradicted by medical records regarding her
16 hand function, and (2) the fact that the record suggested that the claimant's headaches were
17 secondary to her neck problems, which had improved, "both objectively and subjectively after
18 surgery." *Id.* at 1142, 1143.

19 As the Commissioner points out, this record does document Plaintiff's medical
20 improvement after her second surgery.⁴ She cites to a November 11, 2009 progress note that
21 reads, in part: "She ambulates with a normal gait. There still is some definite discomfort noted
22 but she is indeed doing much better. We have therefore released her to return to work full duty . . .
23 ." (Def.'s Mot. at 6 (citing AR at 300).)

24 She also cites to a March 11, 2010 treatment note in which Dr. Krinsky noted "good
25 mobility with some tenderness" and "no swelling." (Def.'s Mot. at 6 (citing AR at 468).) He
26 indicated that Plaintiff "still has not had any work" and that she "will continue with her
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28 ⁴ Because this argument has merit, the Court need not address the remaining arguments in the Commissioner's motion.

independent exercising." (Def.'s Mot. at 6 (citing AR at 468).) Dr. Krinsky's May 4, 2010 comprehensive report noted similar findings: "On examination there was slight tenderness medically, no swelling, good motion, and no instability. . . ." (Def.'s Mot. at 6 (citing AR at 466).) A treatment note from April 14, 2011 also indicated that Plaintiff was "once again dealing quite well with her knee" and that the anti-inflammatory lotion had been "very beneficial." (Def.'s Mot. at 7 (citing AR at 529).)

Plaintiff does not address her medical improvement in her opposition. Instead, she asserts:

Conner agrees with Defendant that in the conventional adjudication of a Social Security disability case the presence of unresolved issues warrants remand. This is not what this Court has determined here. This is not an ordinary case. [*sic*] It is a case where disability has indeed been established.

(Pl.'s Opp'n at 3.) Here, it may be that the medical source statements in the record took this medical improvement into account, and it may be that notwithstanding this medical improvement, Plaintiff suffers from limitations that render her disabled. The Court, however, cannot make these assumptions. It cannot ignore that Dr. Krinsky released Plaintiff to full duty in November 2009, and it cannot ignore that several of his treatment notes show that Plaintiff improved after her second surgery, even if the elements of the credit-as-true rule would otherwise be met in this case.

Had there been medical expert testimony in the record indicating that Plaintiff's knee condition could have improved but nonetheless resulted in the limitations indicated in the medical source statements provided, then the record would be free from any ambiguity as to the severity of her knee condition, and the Court could properly exercise its discretion to remand for payment of benefits instead of for further proceedings. The ALJ shall obtain such medical expert testimony on remand as well as any additional information that would explain why Dr. Krinsky could release Plaintiff to full duty but nonetheless determine that she suffered from the severe limitations described in his medical source statement.

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V. CONCLUSION

For the reasons set forth above, the Commissioner's motion is GRANTED. This case is remanded for further proceedings as set forth in this Court's order on the parties' cross-motions for summary judgment. After assigning proper weight to Dr. Young's opinion as set out in that order, and after obtaining the additional information discussed above, the ALJ shall revisit her disability determination, including step five, if necessary.

IT IS SO ORDERED.

Dated: 03/24/15


KANDIS A. WESTMORE
United States Magistrate Judge